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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX DARNELL HOLIFIELD,

Defendant and Appellant.

B201987

(Los Angeles County
Super. Ct. No. LA054598)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Affirmed as modified.

Lisa M. Bassis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Alex Darnell Holifield appeals his convictions for robbery and attempted robbery. He challenges the sufficiency of the evidence to support three of the robbery convictions. We conclude the convictions are supported by substantial evidence. Appellant argues, and respondent concedes, that the trial court erred in imposing the full 10-year enhancement for firearm use under Penal Code section 12022.53, subdivision (b)¹ on four subordinate counts. We direct the modification of his sentence to rectify that error as we explain.

FACTUAL AND PROCEDURAL SUMMARY

In a two-week period in February and March 2006, there were robberies at three businesses in close proximity in Reseda. The first robbery was at a Wendy's restaurant at 19309 Sherman Way. At 4:00 o'clock in the afternoon of February 26, a man walked to the counter. Employee Airis Willis Evans and a trainee, Edna Ambriz, were at the counter. The man said it was a robbery, but Ambriz did not treat the demand seriously. The robber took off a dark mini backpack, placed it on the counter and said: "I am serious. This is a robbery.'" The robber placed the backpack on the counter, then pulled out a gun and placed it on the counter towards Evans and Ambriz.

Evans told the robber she could not open the register because she did not have the key. She went to get the manager, Bonnie Kiesel, who came to the counter. Evans said the robber sounded as if he was high on drugs. He slurred his words, mumbled a lot, and was talking quietly. She had to ask him to repeat what he said. Once Kiesel arrived, the robber turned the gun toward her. Evans saw the entire gun, which she described as big, and about eight inches long. Kiesel started to open the register at Ambriz's station without realizing a robbery was occurring. Evans told her to look up and Kiesel saw the gun. She then opened both registers and handed the money from the registers to the robber. He placed the money and the gun back into his backpack, put the backpack on, and left. He rode away on a blue and silver bicycle.

¹

All statutory references are to the Penal Code.

A robbery occurred five days later, on March 3, 2006, at a Food Mart convenience store and gas station at the same intersection as the Wendy's. At 9:00 a.m., Anura Edussariya was working alone as the cashier. A man rode up on a blue bicycle, laid it down outside the store, and walked in. He picked up a Diet Coke and a bag of chips and brought them to the counter. Edussariya rang up the items and told the man the total charge. The man, who wore black gloves, removed a brown leather backpack and placed it on the counter. He opened the backpack, said "look at this" and showed a gun inside the pack. He demanded money. Fearful, Edussariya opened the register and handed the man a packet of \$200 in cash. The robber demanded the rest of the money in the register. Edussariya complied and gave him another \$200. The robber put the money in his backpack and rode away on the bicycle.

Ten days later, David Ramirez was working at a Rent-A-Center at 18205 Sherman Way, several blocks from the Wendy's and Food Mart. A man entered the store and asked Ramirez about prices. Ramirez was alone in the store with the man, who acted strangely, spoke very softly, looked over his shoulder towards the door, and was not paying attention to what Ramirez said. This made Ramirez nervous and he went behind the counter area of the store. The man approached the counter, reached into a dark colored backpack, pulled out a gun and demanded money.

Ramirez opened the register and told the robber to take the money, about \$15 in one-dollar bills. The robber looked into the register and told Ramirez to open the safe. Ramirez explained that the safe had a timed lock and could not be opened. At that point, a customer started to walk into the store. The robber returned the gun to his backpack and took off jogging down the street.

The Los Angeles Police Department issued an internal crime alert flyer entitled "Bicycle Bandit" seeking a suspect in these robberies. It was used in roll call briefings to alert patrol officers to watch for suspects matching the description given. On April 28, 2006, Los Angeles Police Officer Michael Flannery was patrolling on his police bicycle near Sherman Way and Wilbur. He saw appellant riding a blue and silver bicycle and

stopped him because he matched the description of the bicycle bandit. Appellant had a pair of black cloth gloves in his jacket pocket.

Appellant had no identification, and first gave a false name and correct birth date. Then he gave his correct name and a false birth date. An investigation determined that appellant had no driver's license and no car registered to him. At booking he was determined to be about 6 feet 2 inches tall and 190 to 195 pounds. After waiving his constitutional rights, appellant denied committing any robberies. He was then told the police had a videotape of him robbing a business with a gun, but the nature of the business was not specified. Appellant replied: "I am staying clean. I never robbed no gas station or no store."

Appellant was charged with seven counts of robbery in violation of section 211 and one count of attempted robbery in violation of sections 664 and 211. Three counts were dismissed before trial at the prosecutor's request. Appellant was found guilty on all the remaining counts and the jury found true the firearm enhancement allegations. Following a bifurcated court trial, the court found appellant had a prior "strike" conviction and found true the prior serious felony conviction and prison term allegations. A second alleged strike prior was stricken. Appellant was sentenced to an aggregate term of 68 years and four months. He was also ordered to pay restitution. He filed a timely appeal.

DISCUSSION

I

Appellant challenges only the sufficiency of the evidence to support his convictions for the robberies of the three Wendy's employees (on counts two, five, and six). He bases his argument on the fact that victim Edna Ambriz did not testify, and the other two victims did not identify him as the perpetrator.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. (*People v. Ramirez* (2006) 39 Cal.4th 398, 463.) If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Valdez, supra*, 32 Cal.4th at p. 104.) A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Bonnie Kiesel, the Wendy’s manager, testified at the preliminary hearing that appellant was not the robber, and that his face was not the same as the robber’s. Kiesel could not make an in-court identification of appellant at trial. When shown a six-pack photographic lineup, Kiesel circled photograph Nos. 1 and 3. Number 3 was a photograph of appellant. Kiesel wrote: “‘Photo number 1 is the one who looks just like him, but the guy was much older, maybe late thirties, early forties, also a little darker in color. Number 3 also photo—more heavier-set man.’” At trial, Kiesel identified the person shown in photograph No. 3 as appellant.

Airis Willis Evans, the other Wendy’s employee robbed on February 26, was asked to make an in court identification at trial. She said: “He doesn’t look familiar to me.” She described the robber to investigating officers as dark complected, with small red slanted dark brown eyes and big lips. He was wearing a blue corduroy hat, a white shirt with a Tupac emblem on it, and an undersleeve with graffiti on the shirt. He was over 6 feet tall, in his mid-thirties. She could not see the robber’s hair because the hat covered his whole forehead. He was very skinny. According to Evans, Exhibit 1, a photograph of the bicycle appellant was riding when arrested, looked similar to the bike on which she saw the robber ride off. It depicted the colors she remembered.

According to Evans, Detective Speer told her she had to pick one person from the photo six-pack. She said she told him, “[N]one of the people in the lineup looked like the

person who robbed Wendy's. And he said I still have to pick one." She then chose photograph No. 3 (appellant) but said: "[N]one of the people looked like the actual person; but, if I had to pick one, he had the most similar looks to the person who robbed" This was two months after the robbery. Evans was shown Exhibit 2, the black and white version of the six-pack, rather than exhibit 5, the color version of the same six-pack.

Appellant also cites differences in the descriptions of the robber given by Kiesel and Evans. Evans said the robber was dark complected while Kiesel said he was light complected. He was six feet tall according to Evans, but only 5 feet 8 inches tall according to Kiesel. He also asserts there was no other evidence placing him at the scene of the crime. Appellant argues at length that eyewitness identification is unreliable, citing California and federal cases in addition to secondary authorities. An eyewitness identification expert testified in appellant's defense, explaining the various factors which impact the reliability of eyewitness identification.

Evidence of the similarities in the unusual *modus operandi* in this series of robberies is discounted by appellant as based on speculation. We agree with respondent that this evidence cannot be so easily dismissed. Appellant does not challenge the evidence supporting his conviction for robbing the Food Mart and for attempting to rob the Rent-A-Center. Victim Evans in the Wendy's robbery testified that the robber left the scene on a blue and silver bicycle. The Food Mart victim described the bicycle ridden by the robber as "blue" and "shiny." When shown a photograph of the bicycle appellant was riding when arrested, the victim said: "It is similar to that bicycle, but I cannot say exactly whether this is the bicycle." He explained that he did not recall silver colors on the robber's bicycle.

In each of the robberies, the perpetrator carried a dark backpack. In the Wendy's and Food Mart robberies, he placed the backpack on the counter, and either pulled a gun from the backpack or opened the backpack to show the gun to the victim. He put the stolen money and the gun into the backpack before leaving. In the Rent-A-Center incident, the perpetrator wore a dark backpack, pulled a gun out of it, and then put the

gun back into the backpack before leaving. The robber in the Wendy's and Rent-A-Center robberies spoke very softly. In each incident, the perpetrator wore a hat. The perpetrator never used a car to flee, instead biking from two crime scenes and jogging away from the third. The victims in the Food Mart and Rent-A-Center crimes identified appellant in court as the perpetrator. Appellant fit the general physical descriptions provided by Evans in the Wendy's robbery and victim Ramirez in the Rent-A-Center attempted robbery. In addition, he volunteered that he had not robbed a gas station and store even though the interrogating officer had not specified the nature of the business which appellant was suspected of robbing. (See *People v Prince* (2007) 40 Cal.4th 1179, 1260 [defendant's modus operandi in similar burglaries sufficient to establish defendant entered each residence with intent to commit theft].)

We conclude a reasonable jury could find appellant guilty of the Wendy's robbery based on the evidence, including the similar modus operandi employed in the string of robberies and the positive identification of appellant as the perpetrator of the crimes at the Food Mart and the Rent-A-Center. "That the evidence in some instances might be reconciled with a contrary finding . . . is not a basis for reversal of any of defendant's conviction[s]." (*People v. Prince, supra*, 40 Cal.4th at p. 1261.)

II

Appellant argues, and respondent concedes, that the proper terms for the firearm enhancements pursuant to section 12022.53, subdivision (b) on counts 2, 4, 5, and 6 should be one-third the 10-year term; three years and four months. Under section 1170.1, subdivision (a), the subordinate term for each consecutive offense shall consist of one-third the midterm of imprisonment, including one-third the term imposed for any specific enhancements.

We conclude the point is well taken. The trial court should have imposed a term of three years and four months for the enhancement on the subordinate terms. (*People v. Moody* (2002) 96 Cal.App.4th 987, 990-994.) The judgment must be modified to reflect the proper terms. On count 1, appellant was sentenced to the midterm of three years, doubled because of the strike finding, plus 10 years under section 12022.53, subdivision

(b); plus five years for the prison prior under section 667, subdivision (a)(1), for a total time on count 1 of 21 years. As to counts 2, 5, and 6, appellant was sentenced to one-third the midterm (2 years), but the abstract of judgment should be corrected to reflect a term of three years and four months on the enhancement for each count. As to count 4 (the attempted robbery), appellant was sentenced to 16 months, but the abstract of judgment should be corrected to reflect a term of three years and four months on the enhancement. The correct aggregate term should be 41 years plus 8 months.

DISPOSITION

The judgment is modified to reflect an enhancement term, pursuant to section 12022.53, subdivision (b) on counts 2, 4, 5, and 6 of three years and four months, with the aggregate term being 41 years and 8 months in state prison. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment showing this modification and shall forward a copy to the Department of Corrections.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.